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Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent

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I. Introduction

Despite years of discussion, dispute, and reform, the laws governing rape[1] remain controversial. Myths about rape fuel this controversy and encourage rhetorical debate. One writer characterizes rape as "a conscious process of intimidation by which *all* men keep *all* women in a state of fear."[2] Another asserts that rape is the result of desires which, once aroused in a man, cannot be controlled and for which women are to blame.[3] Some others claim that rape laws reflect legislative and judicial distrust of all women,[4] the purported jus-

1. This comment deals primarily with the law of forcible rape. Intercourse through fraud, statutory rape, and intercourse with unconscious, mentally or physically incapacitated, or drugged women will not be considered or discussed.

Similarly, although females are considered capable of committing sex offenses upon males, People v. Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732 (1976), such offenses are uncommon and this comment will not discuss them. Rather, the comment will address the more prevalent situation in which a male has forcible, nonconsensual intercourse with a woman who is not his spouse. Thus, when reference is made to the victim it will be in the feminine gender; references to the defendant will be in the masculine.

2. S. BROWNMILLER, AGAINST OUR WILL 15 (1975) (emphasis in original). In a recent interview, Brownmiller conceded that the sentiment was carelessly phrased. Rather, she explained that she intended to convey that all men profit from rape because it keeps all women in fear and thus less likely to defy male dominance. *The Comeback of Womanly Wiles*, TIME, January 30, 1984, at 82.

3. McLaughlin, *The Sex Offender*, 29 POLICE CHIEF 26, 28 (1962). The police have been the target of severe criticism regarding their attitude toward rape victims. One commentator who examined record books at a New York City police station and expressed surprise at the low number of arrests following reported rapes was told by a policeman that the reported rapes were merely the complaints of prostitutes who had not been paid. S. BROWNMILLER, AGAINST OUR WILL 365-66 (1975). Whether this experience is typical is questionable, as reports based on extensive client counseling of rape victims reveal that a majority of women at rape crises centers felt the police had treated them well. One report, written by counselors at Boston City Hospital, notes that the victim of a recent rape is so overwrought that normal actions or statements seem to be threats of assault. Women who are confronted with police when in this hypersensitive condition may feel hostile or humiliated at first, but following subsequent dealings with the police, often express surprise at their initial reaction. A. BURGESS & L. HOLMSTROM, RAPE: CRISIS AND RECOVERY 87 (1979).

4. One commentator interviewed 38 Philadelphia judges with experience in rape trials in an effort to determine judicial attitudes toward rape victims. In concluding that the judges were far less impartial than is commonly believed, the writer cited the complexity of rape trials and the fear of committing the "worst error [in] the criminal justice system" —convicting an innocent man — as the cause of judicial skepticism toward rape allegations. Bohmer, *Judicial Attitudes Toward Rape Victims* in FORCIBLE RAPE 163 (1977).

tification being that the nature of the crime requires close scrutiny of the alleged victim's complaint so that an unjustly accused defendant may be protected.[5]

While protecting the wrongly accused defendant is an essential attribute of the criminal justice system, it is but one goal of the multi-purposed rape laws; rape statutes are designed to both protect women and convict those persons guilty of the crime.[6] To many, these two objectives seemed irreconcilable. Reflected throughout the legislative and adjudicatory history of rape laws is a fear that the larger goal of protecting women will be achieved at the price of convicting some innocent men. This fear was most evident when rape convictions routinely resulted in the death penalty or life imprisonment — sanctions so severe that courts focused almost exclusively on protecting defendants. At times, courts' protective measures succeeded only in exacerbating the anguish of the victim.

Legislative responses to the perceived mistreatment of rape victims by the courts tended to overemphasize a need to vindicate the women's rights.[7] Factions which urged greater protection for defen-

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5. This rationale appears in innumerable discussions on rape laws. Sheldon Toll, an eminent authority on criminal law in Pennsylvania, justifies the "reasonable victim" rule — that a woman resist sexual assault with reasonable resolution — by stating:

> The majority rule is probably related to the extreme penalties which follow a rape conviction under present law; with so much at stake legislators and judges were reluctant to permit a jury to convict a woman's testimony that she was frightened into submission in circumstances where most women would not have been intimidated.

S. TOLL, PENNSYLVANIA CRIME CODE ANNOTATED 367 (1974).

6. *See* Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 638, 640-48 (1976). Early English rape laws reflect a confused purpose, not entirely vindication of a crime against a virgin's body or punishment of a crime against her father's estate. During the reign of William the Conqueror the punishments were severe: castration and loss of both eyes. These penalties, however, were only assessed for raping "virgins of property" — a female who although she could not legally inherit land, would pass on her father's land by marriage. S. BROWNMILLER, AGAINST OUR WILL 25 (1975). The concept of virginity as property lessened to some extent under King Henry II, although rape was still treated as an offense more against property than against a person. The punishment provided by early Pennsylvania law reflected this orientation:

> That Whosoever Shall be Convicted of Rape of Ravishment, that is, forcing a Maid, Widow, or Wife, Shall forefeit One third of his Estate to the parent of the said maid, And if a Widow, to the said Widow, and if a Wife, to the husband of the said Wife.

Act of December 7, 1782 ch. 10, [1682] Charter to Wm. Penn & Laws of the Province of Pennsylvania 110 (1879). By 1718, the law in Pennsylvania defined offenses according to English common law, which under Elizabeth I had purged the property overtones from the rape law. *See* Biener, *Rape I: National Developments in Rape Reform Legislation*, 3 WOMEN'S RTS. L. REP. 45, 48-49 (1976).

7. Some commentators contend that modern rape laws serve the function of providing an orderly outlet for a man's hostility against the rapist who has "ravaged" or "despoiled" his woman. *See* Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 73 (1952). Others state that a woman's right to privacy and physical integrity is the principle of rape laws. *See* Comment, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 160 (1983). Still others, after examining the traditional definition of rape which deals exclusively with penis-vaginal assault, concluded that rape laws seek to protect feminine chas-

dants and those which demanded less traumatic prosecutions for victims were able to agree on one point: the laws governing rape failed to reach either goal. Rapes continued to go unreported,[8] the incidence of the crime increased dramatically,[9] and the number of convictions remained low.[10]

Subsequently, various reforms have been adopted which attempt to reduce the courts' scrutiny of the victim's behavior, thereby encouraging more victims to report rapes.[11] This shift in focus from the victim to the defendant, however, has served only to intensify the concern that innocent men may be convicted.

The conflict between punishing only the guilty and exacting retribution for the victim of a violent crime reaches its height when the defendant alleges that he mistakenly believed that the victim consented to sexual intercourse. In these cases, courts face an acute dilemma: to inflict a severe penalty on a defendant who lacks criminal intent would defeat every purpose of punishment,[12] yet to free a defendant who unreasonably formed the mistaken belief of consent would afford no solice to the raped woman and would breed further contempt for an already-embattled legal system.

Currently, great confusion surrounds the question of whether a defendant's mistaken belief that a woman consented to intercourse constitutes a defense to rape. Jury instructions on mistake vary widely, and often only confuse the jurors and encourage mistrials. In

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tity. *See* Comment, *Reform Rape Legislation*, 49 U. COLO. L. REV. 183, 190 (1978).

8. One police officer hypothesized that 80% of all rapes go unreported. A. BURGESS & L. HOLMSTROM, RAPE: CRISIS AND RECOVERY 92 (1979). Although exact figures are impossible to determine, the Sourcebook of Criminal Justice Statistics estimates that 55% of all rapes are not reported to police. U.S. DEPARTMENT OF JUSTICE, BUREAU OF STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 294 (1982).

9. The Uniform Crime Reports indicate that over an 11 year period (1971-1981), the number of rapes committed increased 74%. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 9 (ANNUAL REPORT 1981). Although this increase may be attributable to a greater willingness to report rapes, the consistently high percentage of unreported rapes indicates that this is not the case.

The number of rapes committed in Australia rose dramatically during the eight years following the closing of all houses of prostitution. Reports of rape increased 149% each year. Geis, *Forcible Rape: An Introduction* in FORCIBLE RAPE 3 (1977). Clearly, any different treatment of rape victims did not alone account for such an increase.

10. Although the precise figures for conviction rates vary among studies, they are always low. One study indicates a conviction rate of less than 2%. C. DEAN & M. DE BRUYN-KOPS, THE CRIME AND CONSEQUENCE OF RAPE 28 (1982).

11. *See infra* notes 15-21 and accompanying text.

12. The purposes of punishment are typically divided into four categories: retribution, deterrence, incapacitation, and rehabilitation. *See* Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84 (1908). However, some scholars of the criminal justice system explain that the purpose of the criminal law is to define that conduct which is socially unacceptable and hold it within limits which are reasonably tolerable. R. PERKINS CRIMINAL LAW 5 (3d ed. 1982). Perkins states, "An incidental but very important function of the criminal law is to teach the difference between right and wrong." *Id.* at 6. Punishing a defendant, then, who did not fully appreciate his behavior was wrongful would do nothing to deter socially reprehensible conduct.

light of the turmoil surrounding the defense, this comment analyzes recent developments in rape laws which emphasize the defendant's conduct rather than the victim's conduct. The difficulty in ascribing to the defendant a definite mental element is illustrated, followed by an examination of the disparate treatment of the mistake defense in both the United States and in England. Finally, this comment advances arguments to support abolition of the defense of unreasonable mistake of fact as to victim consent.

II. Background

A. Rape Reform Laws — A Shift in Focus

Despite conflicting perspectives on the proper solution to the rape problem,[13] many state legislators recently have attempted to reform their state's rape laws.[14] Frequently, these changes have focused on evidentiary rules in rape trials.

One such change has been the enactment of rape shield laws which enable the prosecutrix in a rape case to prevent the defense from admitting as evidence her prior sexual activities.[15] Additionally,

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13. One feminist argues that the crime of rape should be put "in the assault category because rape is clearly a form of assault. This is a neutral rule and . . . women should seek neutral laws, not special laws which give us special protection." Wilson, *Interview with a Feminist Lawyer* in RAPE: THE FIRST SOURCEBOOK FOR WOMEN 140 (1974).

Similarly, another commentator asserts that "rape should not be allowed to remain an oddity in the criminal field: a fertile source of ill-considered deviations from standard procedural and substantive law." Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 20 (1977).

The New York Radical Feminists urge that psychological or biological rationalizations should not mitigate the sentencing of convicted rapists. Connell, *Feminist Action* in RAPE: THE FIRST SOURCEBOOK FOR WOMEN 268 app. (1974). The feminists suggest a number of "short-range goals" designed to eliminate rape. They propose legal actions such as repealing laws that criminalize fornication and homosexuality, and enacting laws penalizing men who "whistle at, comment on, and touch us in the street." *Id.*

Conversely, Dean Wigmore quotes with approval Sir Matthew Hale:

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausable tale.

J. WIGMORE, EVIDENCE 736 (Chadbourne rev. 1970).

14. Most statutory reforms and changes in judicial interpretation of rape statutes occurred within the last decade, perhaps resulting from the "changing outlook on women, or at least a growth of political muscle brought to bear on 'women's issues.' " Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977).

15. These laws have been enacted in various forms in at least 46 states, no doubt in response to recent literature which almost uniformly advocates the adoption of rape shield laws. *See* Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 190 (1978). Some writers do express greater reservation than others, particularly in light of a defendant's sixth amendment right to confront witnesses against him and to produce witnesses in his behalf. *See e.g.*, Note, *Massachusetts Rape Shield Statute: The Need to Balance the Defendant's Constitutional Rights with Victim Protections*, 15 SUFFOLK U.L. REV. 1023 (1981).

some states have repealed the requirement of independent corroboration of victim allegations or rape.[16] Furthermore, cautionary instructions that warn jurors that rape is a crime easily alleged and difficult to refute have been abolished in many jurisdictions.[17]

In addition to reforming the rules of evidence in rape prosecutions, some states also have revised substantive provisions of rape laws. Most notably, this has been accomplished by abolishing the rule barring prosecution of a husband for forcible rape of his wife,[18] an exemption from the law of rape since the seventeenth century.[19]

One commentator asserts that many of the new rules which make prior sexual acts presumptively inadmissible have overcompensated for injustices caused by the old rules that admitted such evidence. Tanford & Boechino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 551 (1980). *See also* Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118, 120 n.10 (1976); Rix, *Rape Shield Statutes — Shield or Sword*, 69 WOMEN'S L.J. 13 (1983).

16. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-68 (West 1974) (repealed); DEL. CODE tit. 11, § 772(c) (1974) (repealed). *But see* GA. CODE ANN. § 26-2001 (1777); MISS. CODE ANN. § 97-3-69 (1972); VA. CODE § 18.2-69 (1975) (expressly requiring corroboration). Other jurisdictions have eliminated the requirement of corroboration through case law. *See* United States v. Ashe, 478 F.2d 661 (D.C. Cir. 1974); People v. Collins, 21 Ill. App. 3d 800, 315 N.E.2d 916 (1974). The corroboration requirement is unique to rape laws and has created an almost insurmountable barrier for the prosecution: the very nature of the crime results in assaults where only the defendant and his accuser are present.

Other states have adopted statutes specifically stating that no corroboration is necessary. *E.g.*, MINN. STAT. ANN. § 609.347 (West Supp. 1977); N.M. STAT. ANN. § 40A-9-25 (Supp. 1975); N.Y. PENAL LAW § 130.15 (McKinney 1975) (repealed 1972); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1983); TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Supp. 1976); WASH. REV. CODE ANN. § 9.79.150 (1977).

17. 1976 IOWA LEGIS. SERV. 594 (West); MINN. STAT. ANN. § 609.347 (West. Cum. Supp. 1977); 3106 (Purdon 1983). Those jurisdictions which no longer use cautionary instructions typically abandoned them under the premise that they are outmoded and reflect the dated attitude that juries must be patronized. Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 198 (1978).

One cautionary instruction which was held to be "unsuitable to modern justice" stated:

> Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character.
>
> A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again.
>
> Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility.

Committee on Standard Jury Instructions of the Superior Court of Los Angeles County, California Jury Instructions, Criminal No. 10.06 (3d ed. 1970). This instruction was abolished in People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975). The court reasoned that since the alleged rapist's past remains inadmissible evidence, the victim in a rape case should enjoy the same protection.

18. Although the majority of state statutes continue to define rape as forcible sexual intercourse by a man with a woman not his wife, a growing majority permit prosecutions of a husband for rape of his wife. *See* CAL. PENAL CODE § 262(a) (West Supp. 1981); CONN. GEN. STAT. ANN. § 53a-67(b) (West Sup. 1981) (exemption removed only from first degree rape); IOWA CODE ANN. §§ 709.1-709.10 (West 1979); KAN. STAT. ANN. § 21-3502 (1983); MINN. STAT. ANN. § 609.341-609.351 (West Supp. 1981); NEB. REV. STAT. §§ 28-408.01 to 28-408.05 (1975); N.H. REV. STAT. ANN. 8632-A5 (Supp. 1983); N.J. STAT. ANN. § 2C:14-5(b) (West Supp. 1981); ORE. REV. STAT. § 163.05 (1979). *See generally* Comment, *The Marital Rape Exemption in Pennsylvania: "With this Ring . . .",* 86 DICK. L. REV. 79 (1981).

19. The commonly cited rationale for the exemption dates back to the writings of the

Terminology defining rape also has been updated, reflecting society's changing attitudes toward sex.[20] Similarly, gender neutral statutes have been introduced, conforming the language used in rape laws with that used in defining other crimes.[21]

The legislative purpose behind these reforms varies, yet their effect has been the same; they turn the attention of the judiciary from the actions of the victim to those of the defendant. Rather than directing rape laws solely toward protecting the defendant from fabricated allegations, these reformed laws are designed to mitigate the jury's exacting scrutiny of the victim.[22] Legislative redefinition of consent provides the clearest illustration of reforms which shift the law's focus from the victim to the accused.

B. Treatment of the Consent Standard

Once state statutes had codified the common law definition of rape, providing that intercourse be accomplished "by force" and "against the will" of the woman,[23] courts struggled to determine

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seventeenth century jurist, Lord Matthew Hale:

> [T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

M. HALE, PLEAS OF THE CROWN 628, 629 (1847). *See generally* Neville, *Rape in Early English Law*, 121 JUST. P. 223 (1957).

20. A number of states which had defined rape in terms of "unlawful carnal knowledge" replaced this phrase with "sexual assault." *See* KY. REV. STAT. ANN. § 510.145 (CRIM. SUPP. 1976); ARK. STAT. ANN. § 41-1801 to -1809 (ARK. CRIM. CODE SUPP. 1976); FLA. STAT. ANN. § 794.011 (West 1975); MO. ANN. STAT. § 566.010 to .130 (Vernon 1978). *See also infra* note 23.

21. Gender neutral statutes are perhaps a response to equal protection arguments made by defendants protesting rape laws which limit protection to females. *See* People v. McDonald, 86 Mich. App. 5, 272 N.W.2d 179 (1978); Brooks v. State, 24 Md. 334, 330 A.2d 670 (1978). These arguments, however, have typically failed since classification of sexual status is reasonably related to the objective of rape statute. *See* Note, *Gender-based Statutory Rape Legislation and the Equal Protection Clause*, 19 AM. CRIM. L. REV. 99 (1981). *See generally* Annot., 99 A.L.R.3d 129 (1980).

22. Juries typically consider extraneous matters such as whether the victim entered a bar by herself, whether she accepted a ride with a casual male acquaintance or stranger, whether she lived with a man to whom she was not married, and whether she had been drinking. Wood, *The Victim in a Forcible Rape Case: A Feminist View* in RAPE: THE FIRST SOURCEBOOK FOR WOMEN 185 n.25 (1974). One study concluded that when a flaw in the victim's character is revealed, a jury will more likely sympathize with the defendant than with the complainant. Wood recounts the following case:

> [A] woman was beaten, raped, and sodomized by four men in an apartment where she had been brought at gunpoint. The defense counsel won the case upon the grounds that both his client, who was the tenant at the apartment where the complainant had been raped, and the prosecutrix were sexual libertines. At the trial he destroyed the victim's reputation, revealing that she was a divorcee whose children were in a foster home, that she had had numerous affairs, and that she was living illicitly with a man at the time of trial.

Id. at 148.

23. At common law, rape was defined as carnal knowledge by a man of a woman not his wife, by force and against her will. R. PERKINS, CRIMINAL LAW 197 (3d ed. 1982). One of the basic differences between statutes which create crimes and statutes which codify common law offenses is their construction: courts interpret the latter according to their common law

what constituted consent: was a woman's consent evidenced by her failure to resist, or did consent require an affirmative act by the woman indicating her willingness to have intercourse? Some courts relied on medical data which indicated that a woman of average strength could pose insurmountable obstacles to all sexual assaults save the most overpowering.[24] Other courts attempted to discern the willingness of a woman to have intercourse by relying on writings of sexual behaviorists who themselves clearly indicated the difficulty of determining whether consent had been given.[25]

To establish greater certainty and consistency in ascertaining consent, courts began to treat a woman's resistance as the outward manifestation of the absence of her consent.[26] This standard, however, presented problems as perplexing as those which had existed before. Some jurisdictions imposed a requirement that the woman resist to the utmost extent possible.[27] This placed a two-fold burden

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meaning and the former according to their everyday meaning. Accordingly, with common law statutes, the statutory language acts only to inscribe the common law — sometimes inexpertly — and as a result of judicial interpretation, the statute may acquire a meaning different from that which is at first apparent. W. LAFAVE & A. SCOTT, CRIMINAL LAW 74 (1972).

Pennsylvania first drafted its rape statute in common law terms in 1860. The codification introduced the phrase "unlawful carnal knowledge" and omitted the victim's status of "wife, widow, or maid" contained in 1682 codification. Act of December 7, 1682, ch. 9 [1682] Charter to Wm. Penn & Laws of the Province of Pennsylvania 110 (1879). The Code of 1860 stated:

> If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will; . . . such person shall be adjudged guilty of felonious rape, and on conviction be sentenced to pay a fine, not exceeding one thousand dollars; and to undergo an imprisonment . . . not exceeding 15 years.

Act of March 31, 1860, Pub. L. No. 405, § 91 in I A Digest of Laws of Pennsylvania from 1700-1883, at 432 (11th ed. rev. by F.C. Brighton, 1885).

24. The Supreme Court of Wisconsin in Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906) concluded that only "the most vehement exercise of every physical means of faculty within the woman's power to resist penetration of her body" demonstrated her lack of consent. To support this standard, the court stated that "medical writers insist that these obstacles [hands, limbs, and pelvic muscles] are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman." *Id.* at 200, 106 N.W. at 538.

25. *See* People v. Evans, 85 Misc. 2d 1088, 1089, 379 N.Y.S.2d 912, 914 (1975) (issue described by the court as whether the defendant's "predatory conquest" of the complainant was rape or seduction). Unfortunately, at times these writings did little more than document misconceptions:

> [A] male is supposed to be physically forceful in his sexual behavior. . . . In many mammals coitus is ordinarily preceded by a physical struggle. . . . The physiological by-products of excitement and exertion — the increased heart rate, increased breathing, muscle tension, the greater supply of blood to the body surfaces, etc. — all of these are also a part of sexual response and it is easy to see how these physiological conditions could facilitate a subsequent sexual response.

P. GEBBARD, J. GANON, W. POMEROY & C. CHRISTENSON, SEX OFFENDERS: AN ANALYSIS OF TYPES 177-78 (1965).

26. *See, e.g.*, People v. Nogworth, 152 Cal. App. 2d, 313 P.2d 113 (4th Dist. 1958); Prokop v. State, 148 Neb. 582, 28 N.W.2d 200 (1947); Perez v. State, 50 Tex. Crim. 34, 94 S.W. 1036 (1906).

27. *See, e.g.*, People v. Dohring, 59 N.Y. 374, 386, 17 Am. R. 349, 358 (1974) (victim "must resist until exhausted or overpowered unless overawed by the number of assailants or the threat of death.") *See also supra* note 24.

on the woman. First, she must have resisted the defendant to the limits of her physical strength, and second, she must have resisted during the duration of the attack.[28] Each requirement alone represented a burden of proof almost impossible for the prosecution to meet. Together, they established a standard so harsh that in one case in which the jury was satisfied that the woman had displayed sufficient resistance, the appellate court overturned the verdict by concluding that the victim's conduct fell short of "utmost resistance."[29]

In addition to creating proof problems, the utmost resistance standard required that a woman risk serious injury to establish her lack of consent. Thus, rape victims were confronted with the Hobson's choice of risking death or serious harm by resisting, or chancing unsuccessful prosecution as a consequence of having submitted to their attackers.

The problem inherent in the utmost resistance requirement encouraged many jurisdictions to develop different standards to determine consent. These variations included "earnest resistance,"[30] "resistance . . . overcome by force or fear,"[31] resistance reasonable under the circumstances,[32] and resistance proportional to the force exerted by the defendant.[33] Each of these variations circumvented the weaknesses of the utmost resistance standard, yet each continued to focus the courts' attention on the victim's resistance rather than on the force exerted by the defendant. A conviction for rape, then, was ironically based more heavily on evidence of the victim's resistance than on a showing of the defendant's act of forcible intercourse.

The preoccupation of the justice system with equating the ab-

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28. Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500 (1975).

29. Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906). The victim alleged that she had been raped by her neighbor's son. In reversing the jury's conviction the court noted that the victim was well acquainted with the defendant and that her clothing was neither torn nor in disarray. *See supra* note 24.

30. N.Y. PENAL LAW § 130.05 (McKinney 1961) (repealed 1982). New York now has eliminated any requirement that the victim resist.

31. KAN. STAT. ANN. § 21-3502(1)(a) (1981).

32. *See, e.g.*, People v. Harris, 108 Cal. App.2d 84, 238 P.2d 158 (2d Dist. 1951) (holding that when the woman ceases resisting for fear of serious injury or death, trial court must determine if her fears were reasonable). *Accord* Shepard v. State, 224 Ind. 356, 67 N.E.2d 534 (1946).

33. In the tentative draft to the 1962 Model Penal Code, the drafters designed their definition of rape to shift the focus from the victim's conduct to the defendant's. The victim was still required to demonstrate some resistance to the force used by the defendant during the assault. However, the amount of resistance exhibited by the victim needed to establish her lack of consent depended on the force used by the defendant. The victim's conduct, then, was examined only as a response to the defendant's. *See* MODEL PENAL CODE § 207.4, Comment at 247 (Tent. Draft No. 4, 1955). Courts which required that the victim's resistance be proportional to the force used by the defendant nevertheless emphasized the victim's conduct. *See* People v. Carey, 223 N.Y. 519, 119 N.E. 83 (1918).

sence of resistance with consent generated a host of criticism.[34] Legislatures, such as Michigan's, swayed by the severity of these criticisms, enacted rape statutes which drastically departed from the common law approach to rape.[35] Most notably, far-reaching reform provisions stated that the victim need not resist.[36]

Abandonment of the resistance requirement has received both positive[37] and negative[38] reactions. Reverberations continue to be felt as the provision eliminates the victim's former burden of proving lack of consent, in turn rendering evidence of the victim's past sexual activities irrelevant.

To counteract the fear that defendants who actually believed that the victim was consenting would be convicted for rape, courts have permitted, with greater frequency, jury instructions on mistakes of fact.[39] Spurred by this new development, defense attorneys have, with increasing success, used the mistake of fact defense to negate the consent element of the crime.[40]

Increased use of the defense[41] has done little to clarify its proper application to rape trials. Whether the mistake must be reasonable varies among jurisdictions, often despite similarity of statutes defining the offense.[42] Confusion increases in states such as Hawaii,

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34. *See* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13 (1977).

35. *See* MICH. COMP. LAWS §§ 750.520a-1 (1974) (MICH. STAT. ANN. §§ 28.788(1)-(12) (1982)). The Michigan statute employs gender neutral terms, defines sexual penetration to include the intrusion of "any object into the genital or anal openings of another person's body," and authorizes a maximum 15 year sentence of for the offense of "sexual contact," the touching of the victim's or actor's genitals or surrounding clothing for the purpose of sexual arousal or gratification. *Id.*

36. MICH. COMP. LAWS § 750.520i (1974) (MICH. STAT. ANN. § 28.788(9) (1982)).

37. Some commentators note with favor that the statute directs the court's focus away from the victim's prior sexual activity and towards the amount of violence used by the defendant. *See, e.g.*, Cobb & Schauer, *Michigan's Criminal Sexual Assault Law* in FORCIBLE RAPE 169 (1977).

38. The Model Penal Code criticizes the Michigan statute for implying that resistance need never be a factor in forcible rape. According to the drafters of the Code, this overbroad response to the problem of determining consent could result in rape convictions whenever forcible intercourse occurred, even with the woman's consent. MODEL PENAL CODE § 213.1 comment 4(a) (1980).

39. *See infra* note 64.

40. *See, e.g.*, State v. Scott, 649 S.W.2d 559 (Mo. Ct. App. 1983) (trial court's failure to instruct jury on defendant's mistaken belief that victim consented to intercourse was prejudicial error); State v. Foster, 631 S.W.2d 672 (Mo. Ct. App. 1982) (defendant drove victim to secluded woods and threatened her with attack dogs; trial court's failure to instruct on mistake of fact as to consent was prejudicial error); *But see, e.g*, People v. Witte, 115 Ill. App. 3d 20, 449 N.E.2d 966 (1983) (defendant's unreasonable belief in victim's consent is not a defense to rape). *See generally* G. FLETCHER, RETHINKING CRIMINAL LAW 691-713 (1978).

41. Mistake of fact, although termed a defense, is not an affirmative defense in the true sense. Rather, the burden remains on the prosecution to establish the requisite mental culpability. As a practical matter, however, the defense counsel attempts to persuade the judge and jury that the defendant lacked the state of mind necessary to commit the crime. G. DIX & M. SHARLOT, CRIMINAL LAW 298 (2d ed. 1979).

42. *See infra* notes 55-88 and accompanying text.

which define rape as the intent to have forcible intercourse,[43] an amendment which changes the crime from one requiring general mens rea to one of specific mens rea.[44]

The classification of rape as either a specific or general intent crime is critical to the handling of the mistake of fact defense. An honest mistake, no matter how unreasonable, excuses a defendant who would otherwise be guilty of a crime requiring specific intent,[45] while general intent crimes require both honesty and reasonableness as to mistake.[46]

III. Variations of the Mistake of Fact Defense

A. Difficulty in Defining a Mens Rea Standard

As the focal point of rape laws has moved from the victim's to the defendant's conduct, legislative and judicial determination of the mental element required to commit rape has proved to be as difficult as it is essential. The question of mental culpability often did not arise under older rape statutes; rather, the intent to commit rape was inferred from the defendant's use of physical force to accomplish intercourse.[47] Under more recently enacted rape statutes, however, determining the level of mental culpability required to commit the offense becomes more difficult.[48]

Rape statutes drawn from the common law contain no express language delineating the degree of culpability required to commit the offense.[49] The defendant need only to have formed the "general" intent to have intercourse with a woman by force and against her will. Therefore, a defendant who has formed the intent to engage in the prohibited act of rape possesses the mental culpability necessary

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43. HAWAII REV. STAT. § 707-730(1)(a) (1975).

44. Literally translated, "mens rea" is "guilty mind." As one of the most elusive terms in criminal law, *mens rea* has been defined in innumerable ways. The concept at its most basic refers to "the awareness of the existence of all those facts which make a person's conduct criminal." U.S. v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941).

45. *See infra* notes 47-54 and accompanying text.

46. *Id.*

47. In the early case of Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941), the court inferred the defendant's intent to commit rape from his physical act of forcible intercourse. The court stated that "[i]n the crime of rape no intent is requisite other than that evidenced by the doing of the acts constituting the offense." *Id.* at 77, 156 S.W.2d at 387 (1941).

48. Unlike the older statutes, in which resistance implied force which indicated intent, the newer statutes that have minimized or abolished the resistance requirement preclude courts from making direct inferences. *See* Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1533 (1975).

49. Wisconsin's old common law statute provided:

> Any person who shall ravish and carnally know any female of the age of fourteen years or more, by force and against her will, shall be punished by imprisonment in the state prison not more than thirty years nor less than 10 years. . . .

Law of May 2, 1895, ch. 370, § 2 [1895] Wis. Laws 753.

for conviction.[50] The general intent required under common law rape may, however, be negated by the defendant proving that his mental faculties were impaired or that he made a reasonable mistake about whether the victim consented.[51]

The apparent simplicity of the general intent requirement under common law rape statutes is deceiving.[52] Courts at times confuse common law rape with assault with intent to rape,[53] a separate offense which requires the specific intent to commit rape rather than the general intent to have forcible intercourse against a women's will. The distinction is tenuous, but critical. In general intent crimes a mistake of fact must be both honest and reasonable to excuse the commission of the offense, while in specific intent crimes, the mistake need only be honest.[54] An unreasonable mistake, then, excuses the defendant who commits a crime of specific intent but not the defendant who commits a crime of general intent. Frequently, case law deviates from this precept.

B. Unreasonable Mistake of Fact as a Defense

1. Case Law in Support of the Unreasonable Mistake Defense. — The most thorough recent treatment of the mistake of fact defense is the Alaska Court of Appeals' decision in *Reynolds v. State*,[55] in which the court held that the state must prove that the

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50. *See* State v. Bender, 24 Conn. Supp. 214, 189 A.2d 408 (1962). *Cf.* State v. Daniels, 109 So.2d 896, 899 (La. 1958) ("general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished the result").

51. *See* R. PERKINS, CRIMINAL LAW 831 (3d ed. 1982).

52. The Model Penal Code has abandoned the terms "general" and "specific" intent, calling the phrases "an abiding source of ambiguity and confusion in the penal law." Model Penal Code § 2.02 Comment (Tent. Draft No. 4, 1955). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960).

53. *See* State v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954). The defendant, a serviceman stationed abroad, mistook a Japanese woman for a prostitute. Further, he mistook her protestations as price negotiations. At trial, the defendant was convicted for assault with intent to rape. In affirming the conviction, the appeals court discussed the crime in terms of general intent.

Justice Brosman, in a separate opinion concurring in part and dissenting in part, reasoned that assault with the intent to commit rape is, by its very definition, a specific intent crime and that an unreasonable mistake of fact — like the one asserted by the defendant — should exculpate him. Rape, on the other hand, is ordinarily treated as a general intent crime for which a mistake must be reasonable to negate intent. Brosman admitted that the reasoning seemed anamolous, but concluded that it was no more so than that "involved in holding that an assault with intent to murder requires a specific intent to kill, whereas the crime of murder may be made out with a lesser intent." *Id.* at 439, C.M.R. at 13.

54. *See supra* notes 44-47 and accompanying text.

55. 664 P.2d 621 (Alaska Ct. App. 1983). The defendant, Reynolds, was convicted of sexual assault in the first degree despite his contention that the complainant had consented. On appeal, Reynolds attacked the constitutionality of Alaska's sexual assault statute, alleging that the statute, which contained no mens rea language, was unconstitutionally vague and set a standard of strict liability regarding consent.

defendant acted at least recklessly regarding the complainant's lack of consent.[56] By establishing a requirement of recklessness, the court acknowledged that unreasonable conduct in failing to ensure that the woman consented constitutes a valid defense.

Previously, Alaska had based its definition of rape on the common law.[57] Because the offense was treated like a general intent crime, the state bore the burden of proving that the defendant intended forcible intercourse against the woman's will. The prosecution was not required to prove that the defendant either knew or should have known that the woman did not consent. In applying this common law rule, courts required that the victim resist to the utmost.[58]

In Alaska, the utmost resistance standard was plagued with the same problems as had been encountered in other jurisdictions.[59] Eventually, the legislature abolished any provisions that the victim resist at all.[60] The court noted this development by stating, "[T]he legislature has substantially enhanced the risk of conviction in ambiguous circumstances by eliminating the requirement that the state prove resistance."[61]

To counteract this risk, the court interpreted the revised statute to require a culpable mental state for every element of the crime, including lack of consent.[62] As the statute itself failed to specify the mental state required of the defendant in determining lack of consent,[63] the court looked to legislative intent and required that the defendant be reckless in ascertaining consent to be guilty of rape.[64]

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56. *Id.* at 625. The Alaskan statute provides in pertinent part: "A person commits the crime of sexual assault in the first degree if, being any age, the defendant engages in sexual penetration with another person without consent of that person." ALASKA STAT. § 11.41.410(a)(1) (1983).

57. *See* Walker v. State, 652 P.2d 88 (1982) (rape defined as a general intent crime requiring only proof of voluntary commission of the prohibited act to support conviction).

58. *See supra* notes 27-29 and accompanying text.

59. *See* State v. Risen, 192 Or. 557, 235 P.2d 764 (1951) (construing a statute similar to ALASKA STAT. 11.150.120). The court interpreted utmost resistance as resistance "reasonably proportionate to [the woman's] strength and her opportunities. It must not be a mere pretended resistance but in good faith and continued to the extent of the woman'a ability until the act has been consummated." *Id.* at 558, 235 P.2d at 765. *See also supra* note 33.

60. ALASKA STAT. 11.41.470(3)(A) (1983) (providing that "without consent means that a person with or without resisting is coerced by the use of force. . . .").

61. 664 P.2d 621, 624 (Alaska Ct. App. 1983). The court noted that the legislature had also broadened the definitions of "force" and "physical injury" to include, respectively, "force against a person or property" and "express or implied threat of death". *Id.*

62. The Alaskan statute comports with the Model Penal Code in this regard. The Code requires that "when the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." *See* S. TOLL, PA. CRIM. CODE ANN. § 302(c) at 64 (1974).

63. To commit sexual assault in the first degree under the Alaskan statute, a person must either "engage in sexual penetration with another person without consent of that person" or "attempt to engage in sexual penetration with another person without consent of that person and cause serious physical harm to that person." ALASKA STAT. § 11.41.410 (1983).

64. The committee responsible for drafting the statute suggested:

Despite the court's painstaking interpretation of Alaskan law, the *Reynolds* decision is flawed in two respects. First, after recognizing that the legislature substantially reduced the prosecution's burden of proving the act of rape by eliminating the requirement that the victim resist, the court frustrated the purpose of the legislation by allowing the defendant to argue that because the victim did not resist, he believed — albeit unreasonably — that she consented.

Once the defendant raises this unreasonable mistake of fact defense the burden of disproving the claim properly falls on the prosecution.[65] The state's most effective attack is to offer evidence that the victim actively resisted. A jury would be unlikely to believe a defendant who argues that he honestly but mistakenly believed the victim consented when confronted with a battered woman. In permitting both reasonable and unreasonable mistakes of fact to constitute defenses, then, the *Reynolds* court renders prosecutions involving a victim who does not actively resist just as likely to fail as similar cases which arose when Alaska law required resistance.

The second flaw in *Reynolds* is that although the court recognized that Alaska's definition of rape is based on the common law and is therefore a crime of general intent, [66] the court ignored the basic doctrine of such common law statutes: if the defendant can show that he mistakenly believed that the victim consented to intercourse, he lacks culpable intent — provided that the mistake is *both* honest and reasonable.[67]

2. The Unreasonable Mistake Defense in Pennsylvania. — Unreasonable mistakes appear to be a defense to rape in Pennsylvania, although a recent holding by a three-judge panel of the Pennsylvania Superior Court[68] has clouded the issue. In *Commonwealth v. Williams*,[69] the Superior Court upheld the trial court's denial of a

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> [W]hen a statute in the Code provides that a person must recklessly cause a result or disregard a circumstance, criminal liability will result if the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for recklessness is a subjective one — the defendant must actually be aware of the risk. On the other hand, if criminal negligence is the applicable culpable mental state, the defendant will be criminally liable if he "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for criminal negligence is an objective one — the defendant's culpability stems from his failure to perceive the risk.

ALASKA LEGISLATIVE COUNCIL, REPORT TO THE GEN. ASSEMBLY OF 1976, at 2 (1978), *quoted in* Reynolds v. State, 664 P.2d 621, 625 (Alaska Ct. App. 1983).

65. *See supra* note 41.

66. 664 P.2d 621, 623 (Alaska Ct. App. 1983).

67. *See supra* notes 49-54 and accompanying text.

68. Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982).

69. 294 Pa. Super. 93, 439 A.2d 765 (1982). The defendant offered the victim a ride and then drove her to a dark, secluded area and demanded intercourse. After the defendant twice threatened to kill her, the victim told him to "get on with it." *Id.* at 95, 439 A.2d at 767.

jury instruction on mistake of fact. The instruction proffered by the defense stated that a reasonably held belief that the victim consented to intercourse would exculpate the defendant.[70] In refusing to give this instruction to the jury, the court contended that the use of force to accomplish intercourse without a person's consent is the only criteria of concern to Pennsylvania courts in rape cases. The court cited the Pennsylvania rape statute, which defines rape as intercourse by forcible compulsion that prevents resistance by a reasonable person, in support of this conclusion. Under the *Williams* holding, then, any belief held by defendant, either reasonably or unreasonably, that his victim consented is immaterial. The court stated that it refused to create a defense of "the defendant's belief as to the victim's state of mind."[71] Rather, such a defense must be established by the legislature.

The *Williams* case raises the question whether a mistake of fact defense concerning victim consent exists in any form in Pennsylvania. The decision has its critics. The subcommittee charged with drafting Pennsylvania's Suggested Standard Jury Instructions questions whether *Williams* is consistent with the Pennsylvania Crimes Code, specifically the sections which define levels of culpability[72] and describe the defense of ignorance or mistake.[73] The former section provides that when the mental intent necessary to commit an offense is not stated, the defendant must act at least recklessly.[74] The latter section states, in part, that a mistake of fact affords a defense if it negates the mens rea required for the crime, provided that there is

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At trial, a jury convicted the defendant of rape. The conviction was affirmed on appeal over the defendant's contention that the trial judge erred in denying an instruction on mistake of fact.

70. *Id.* at 98, 439 A.2d at 769. The instruction was based on the charge given to the jury in Gordon v. State, 32 Ala. App. 388, 26 So. 2d 419 (1946). In *Gordon*, the court instructed that:

> If the jury believes, from the evidence, that the conduct of the prosecutrix was such toward the defendant, at the time of the alleged rape, as to create in the mind of the defendant the honest and reasonable belief that she had consented, or was willing for the defendant to have connection with her, they must acquit the defendant.

32 Ala. App. 388 at 390, 26 So. 2d at 420. In *Williams*, the defendant inexplicably omitted form his instruction the qualification that his mistaken belief need be honest as well as reasonable.

71. 294 Pa. Super. 93, 98, 439 A.2d 765, 769 (1982). Implicit in the *Williams* court's reluctance to instruct the jury on mistake is its dismissal of *Gordon* as an "obscure Alabama case." *id.* The cases are distinguishable in that the victim was intoxicated in *Gordon* and argued that in being "mentally unconscious from drink," she could not give effective consent. *Id.* Thus, the defendant in *Gordon* mistakenly believed that the victim was sober enough to be responsible for her acts. As the element of intoxication is absent for *Williams*, the victim's state of mind is not at issue. Rather, the defense concerns the defendant's mistaken belief as to the victim's outward behavior.

72. S. TOLL, PA. CRIMES CODE ANN. § 302 (1974).

73. *Id.* § 304.

74. 18 PA. CONST. STAT. ANN. § 302 (Purdon 1973).

"a reasonable explanation or excuse for the defense."[75]

Since Pennsylvania's rape statute, like most statutes derived from the common law, contains no express mens rea requirement,[76] the mental element required to commit rape in necessarily recklessness. Under the Crimes Code, then, any mistake of fact for which there is a reasonable justification and which negates the recklessness required to commit rape exculpates the defendant. The Subcommittee, therefore, properly questions the *Williams* court's refusal to instruct the jury on the reasonable mistake of fact defense.

The Subcommittee advocates that Pennsylvania courts should recognize as a defense any non-recklessly held belief concerning consent.[77] The defendant who unreasonably believes that a woman consents to intercourse does not behave as a reasonable man would, yet his conduct is not necessarily reckless. According to the Subcommittee, Pennsylvania courts should recognize defendants' unreasonably held mistakes that their victims consent as a defense to forcible rape.

The Subcommittee's analysis is preferrable to that of the *Williams* court because it recognizes that a defendant's belief that his victim has consented precludes his conduct in compelling intercourse from being forceful. As forcible compulsion is an element of the crime of rape, the defendant's belief that his victim consented is material to establishing his guilt or innocence, contrary to the court's statement in *Williams*. The Subcommittee's position, however, gives little weight to the qualification in the Crimes Code that a mistake need be reasonable to afford a defense. The Joint State Government Commission's commentary to the Ignorance or Mistake provision of the Code states:

> [A] bona fide and reasonable belief in the existence of facts, which would render an act innocent if they did exist, is a good defense. Where mistake of fact is not based upon reasonable grounds, it is not a defense even though the belief in its existence is bona fide. . . .[78]

Should this commentary be applied, a mistake of fact which is hon-

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75. S. TOLL, PA. CRIM. CODE ANN. § 304 (1974).

76. The statute provides:

> A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.

18 PA. CONS. STAT. ANN. § 3121 (Purdon 1973).

77. The recommendation states that "the court should recognize as a defense a defendant's non-recklessly held, mistaken belief regarding consent." PA. SUGGESTED STANDARD JURY INSTRUCTIONS (Crim) § 15.3121A (Reporter's Draft 1983).

78. S. TOLL, PENNSYLVANIA CRIMES CODE ANNOTATED § 304 Pennsylvania Joint State Government Commission note (1974).

est but not reasonable fails as a defense. The unreasonable belief may, however, reduce the gravity of the offense.[79] Thus, the unreasonable mistake under Pennsylvania law should be a mitigating factor which reduces the crime from rape to a lesser offense. A nonreckless, unreasonably held belief should afford no defense.

3. Case Law Rejecting the Unreasonable Mistake Defense. — The Supreme Court of California was one of the first courts to respond to the risks created by the substantial dilution of the resistance requirement which has occurred in most jurisdictions.[80] To counteract the increasing possibility that an innocent defendant might be convicted when the victim's lack of consent was ambiguous, the court held in *People v. Mayberry*[81] that the defendant is entitled to an instruction on honest and reasonable mistake of fact.[82] The court did not address whether an unreasonable mistake would constitute a defense to rape, but rather, it implicitly rejected the unreasonable mistake defense by concluding that the defendant must "reasonably and genuinely" believe that the victim consented.[83]

Unlike the Alaskan statute construed in *Reynolds*, which provided that resistance was not required of the complainant,[84] the California statute applied in *Mayberry* required that a woman resist and that her resistance be overcome by force.[85] The presence of a resis-

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79. *See infra* note 131 and accompanying text.

80. California traditionally has been a leader in rape reform legislation. *See, e.g.*, CAL. PENAL CODE § 667.6 (West 1970) (full, separate, and consecutive sentences imposed for multiple sex crimes); CAL. PENAL CODE § 667.8 (life sentence for habitual sex offenders). *See also*, People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 670, 39 Cal. Rptr. 361 (1964) (first case to allow a reasonable but mistaken belief that a girl was above the statutory age as a defense to statutory rape). *See generally* Note, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 STAN. L. REV. 266 (1965).

81. 15 Cal. App. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975). The defendant followed the victim into a grocery store and demanded that she accompany him outside. She left with him, then persuaded him to allow her to return to the store to buy cigarettes. When the victim completed her purchase, the defendant seized her by the elbow and led her to his apartment where he sexually assaulted her. Although the defendant had verbally threatened the victim she failed to request help or attempt escape.

82. The instruction provides:

> It is a defense to a charge of forcible rape that the defendant entertained a reasonable and good faith belief that the female person voluntarily consented to engage in sexual intercourse. If from all the evidence you have a reasonable doubt whether the defendant reasonably and in good faith believed she voluntarily consented to engage in sexual intercourse, you must give the defendant the benefit of that doubt and acquit him of said charge.

CALIFORNIA JURY INSTRUCTIONS, CRIMINAL INSTRUCTION No. 10.23 (1979). The court acknowledged that the complainant's behavior was equivocal and that the defendant could have construed that she consented. Sufficient evidence also permitted the jury to infer that the prosecutrix was unable to think clearly or react because of fear. The majority, therefore, held that the trial court erred in refusing the instruction.

83. 15 Cal. 3d 143, 158, 542 P.2d 1337, 1344, 125 Cal. Rptr. 745, 754 (1975).

84. *See supra* note 60.

85. "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator . . . [w]here she resists, but her resistance is overcome by force or violence." CAL. PENAL CODE § 261(3) (West 1970) (amended 1980).

tance requirement explains why the *Mayberry* court was less hesitant than the *Reynolds* court to recognize honest and reasonable mistakes of fact as a defense: the threat of false conviction was substantially lesser under the old California statute where the victim was required to resist than under the statute applied in *Reynolds*.[86]

In *State v. Dizon*,[87] the Supreme Court of Hawaii, like the California and Alaska courts acknowledged the erosion of the strict standard of "utmost resistance," but unlike them specifically rejected an instruction on mistake of fact which did not clearly detail that the mistake must be reasonable.[88] The court dismissed the instruction as "confusing and misleading" and "not . . . a full statement of the law."[89] To support its decision, the majority stated the common law principle that a mistake of fact which acts as a defense to a crime of general intent may not be formed as a result of the defendant's negligence or carelessness.[90]

Neither the *Mayberry* nor the *Dizon* court offered strong justification for their holdings other than by indicating that rape is a crime of general intent. The opinions, therefore, present scant precedent for courts seeking to establish that a defendant's mistaken belief that his victim consented must be reasonable.

C. England's Approach to Mistake of Fact: Rape as a Crime of Specific Intent

In England, courts grappled with the same questions concerning the appropriate standards for stating a consent defense and produced elegant discussions of mens rea. The conclusions reached by the English courts, however, differ radically from those of the American courts.

The facts in *Director of Public Prosecutions v. Morgan*[91] typify the bizarre circumstances under which the mistake of fact defense arises in rape cases. The defendant, Morgan, was drinking with the three other defendants. All were members of the R.A.F. Morgan, who was considerably older and senior in rank, invited his companions to have intercourse with his wife. Though surprised, they ac-

86. In 1980, the California Legislature amended § 261 to read that rape is an act of sexual intercourse "where it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(2) (West Supp. 1984).

87. 47 Hawaii 444, 390 P.2d 759 (1964).

88. The instruction read in pertinent part: "if you believe from the evidence that the defendant in fact believed that consent to the act had been given . . . you must find him not guilty of the crime of rape." *Id.* at 459, 390 P.2d at 769.

89. *Id.*

90. *See* 1 F. WHARTON, CRIMINAL LAW AND PROCEDURE § 157 at 382 (1957).

91. [1975] 2 W.L.R. 913.

cepted his explanation that Mrs. Morgan was "kinky"[92] and enjoyed forcible intercourse. At trial, the defendants testified that Mrs. Morgan had willingly consented. Mrs. Morgan testified that she had been brutally raped and humiliated. The trial judge instructed the jury that a person would not be guilty of rape if he honestly and reasonably believed the complainant consented.[93] The jury convicted all four defendants, three of whom appealed.

The Court of Appeals[94] dismissed the appeal and held that the instruction was proper. The court also certified the question of mistake to the House of Lords: "Whether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented, if such a belief was not based on reasonable grounds."[95] The House of Lords held, by a three to two majority, that an honestly held belief that a woman consented to intercourse exculpates a defendant charged with rape. The Lords further held that the trial judge had misdirected the jury by stating that the mistaken belief must be reasonable as well as honest.

The majority acknowledged that crimes of general intent necessitate that a mistake pled as a defense be both honest and reasonable.[96] But rape, they reasoned, requires the specific intent to have intercourse without the victim's consent. A defense of honest and reasonable mistake was intended to buttress the poorly drafted mens rea requirement of general intent crimes. The court cited the nineteenth-century bigamy case of *Regina v. Tolson*,[97] which held that a mistaken belief based on reasonable grounds affords a defense. The majority argued that the same defense used to excuse a statutory offense like bigamy could not be applied to a common law crime like rape where the treatment of mens rea is entirely different.[98]

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92. *Id.* at 929.

93. The instruction stated:

> [I]f the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would be not guilty of the offense of rape, but such a belief must be honestly held by the defendant in the first place. . . . And, secondly, his belief must be as a reasonable man would entertain if he applied his mind and thought about the matter. It is not enough for a defendant to rely upon a belief, even though he honestly held it, if it was completely fanciful; contrary to every indication which could be given which would carry some weight with a reasonable man.

Id.

94. Regina v. Morgan [1975] 1 All E.R. 8.

95. *Id.* at 922 (emphasis deleted).

96. [1975] 2 W.L.R. at 941.

97. 23 Q.B.D. 168 (1889).

98. Lord Fraser described the statutory crime of bigamy dealt within *Tolson* as an "absolute offense," requiring no intention except that of "going through a marriage ceremony." 2 W.L.R. at 945. Since no mental element is required, a defendant's mistaken belief that his spouse is dead cannot negate a material element of the crime. Rape, however, "always has been defined as intercourse without consent of the victim," thus requiring "the intention to commit the act." *Id.* at 937 (Hailsham, L).

Lord Simon, dissenting, agreed with the lower court that a belief for which the defendant can give no reasonable basis is "evidence of insufficient substance to raise any issue requiring the jury's consideration."[99] More importantly, though, Lord Simon advanced the position advocated by rape legislation reformers in the United States: a more even balance must be struck between the victim and the accused. This could be accomplished, Lord Simon reasoned, by requiring that a defendant base his honestly held mistaken belief on reasonable grounds.

IV. The Aftermath of Morgan

A. The Reaction Abroad

The *Morgan* decision created a furor in England and Australia.[100] In response to public demand, a committee was organized to study the decision and to make recommendations on the proper course of action.[101] The report released by the committee affirmed the soundness of the *Morgan* holding and made two recommendations. First, the court's conclusion that recklessness regarding consent is the mental element required to support a rape conviction must be codified to prevent its dismissal as dicta. Second, a means by which the jury in a rape case determines whether the defendant honestly believed that the woman consented must be developed.[102] The committee urged that juries consider the reasonableness of the

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Although the Lords' definition of bigamy as a general intent crime seems at least plausible, their interpretation of rape as a specific intent crime further complicates the definition of mens rea. The statute applicable in *Morgan* simply states that it is a crime "for a man to rape a woman." Sexual Offenses Act 1956, 4 & 5 Eliz. II, ch. 69, § 1(1). The statute states the common law definition of rape, similar to that applied in colonial America. *See supra* note 23.

The majority of the Lords interpreted the common law of rape as requiring specific intent, however, the common law of rape in America is treated as a crime requiring general intent. Therefore, the arguments forwarded by Lord Hailsham defining the specific intent required for rape are similar to those used in the United States to define the general intent needed for the offense. *See generally* Howard, *The Reasonableness of Mistake in the Criminal Law*, 4 U. TORONTO L.J. 45 (1961).

99. [1975] 2 W.L.R. at 943. The second dissenting opinion given by Lord Edmund-Davies, argued that a belief need only be honestly held, but the jury should consider the reasonableness of the belief in determining its honesty. *Id.* at 949. This approach balances the views proffered by the majority and Lord Simon. *See* 8 SYDNEY L. REV. 196, 200 (1977).

100. The public's intense reaction to *Morgan* can be attributed in part to an earlier decision by the court in Director of Public Prosecutions v. Smith, [1961] A.C. 290.

In *Smith*, the court upheld a murder conviction based on jury instructions which charged that murder is committed willfully when a "reasonable man [would] have contemplated that grievous bodily harm was likely to result. . . ." *Smith* resulted in English jurists approaching the reasonable man standard with undue caution. One commentator states, "[T]he decision in [*Morgan*] was probably more a reaction to past infelicitous decisions, than the result either of natural reason or of the artificial reason of lawyers." G. FLETCHER, RETHINKING CRIMINAL LAW 704 (1978).

101. *See* Note, *The Intent Necessary to Rape*, 8 SYDNEY L. REV. 196, 202 (1977).

102. *Id.*

defendant in holding the honest belief, implying that if the defendant was unreasonable in his belief, a jury would conclude that he was lying.[103]

The *Morgan* holding was extended in England in the case of *Regina v. Cogan*.[104] The co-defendant, Leak, invited Cogan to have intercourse with his wife, whom he had earlier beaten and threatened. Mrs. Leak displayed obvious distress during the intercourse. At trial, a jury convicted Cogan after finding that he had no reasonable grounds on which to base a belief that Mrs. Leak consented.[105] On appeal, Cogan's conviction was overturned when the court, applying *Morgan*, found that he had honestly believed that the complainant consented because of the representations made to him by Leak.[106] The subjective standard of an honest belief, however unreasonable, thus is well entrenched in English law.

Australian courts have reached similar conclusions. The Criminal Law and Penal Methods Reform Committee of South Australia supported the *Morgan* holding in its special report, stating that because rape is such a serious crime, liability should be imposed only for recklessly held beliefs.[107]

Following the lead of England, the Australian committee asserted that the jury would disbelieve a defendant who alleged an honest mistake regarding consent in cases where force was apparent. The committee further undermined arguments that mistakes of fact must be reasonably by noting that supporters of the reasonable mistake requirement tend to view rape as a crime between the victim and the defendant, rather than between the crown and the accused, the implication being that too much emphasis is placed on the victim in a rape case.[108]

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103. The committee's concern with the "reasonably honest defendant" undercuts the *Morgan* court's insistence on creating a subjective standard for mistakes. However, one commentator states that "it may be true, as a matter of practice, that only mistakes rendered believable by the circumstances of the case will in fact generate an acquittal." G. FLETCHER, RETHINKING CRIMINAL LAW 708 (1978).

104. [1977] 3 W.L.R. 316.

105. *Id.* at 317.

106. Cogan mistook the victim's sobs to mean consent as a result of Leak's statements and his own extreme intoxication. The Court of Appeals, in discussing the mistake of fact defense, failed to clarify whether Cogan's mistake was presumably a result of the misrepresentations or the intoxication. If it were the latter, the decision would extend *Morgan* to allow voluntary intoxication which negates intent as a defense to rape. This result conflicts with both the common law and Model Penal Code, where voluntary intoxication is no defense to rape. *See* Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1541 (1975).

107. *See* Note, *The Intent Necessary to Rape*, 8 SYDNEY L. REV. 196, 204 (1977).

108. *Id. Quaere* whether this statement takes into account the purposes of rape laws: to convict guilty defendants and to protect the privacy and physical integrity of women. Lord Simon reasons:

> A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with

Prior to the committee's report and the *Morgan* decision, Australian courts followed *Regina v. Brown.*[109] In *Brown*, the Supreme Court of South Australia held that an honest belief that the woman consented is inconsistent with the mens rea necessary for rape. Under this holding, the reasonableness of the mistaken belief is irrelevant.

In England and Australia, then, the emphasis when the mistake of fact defense is raised historically has been on the honesty of the defendant's belief. The importance of ascertaining a defendant's subjective state of mind explains the courts' emphasis on the honesty of mistakes, for to determine honesty, courts must necessarily focus on the individual and his perceptions. As a practical matter, the subjective and objective inquiries are merged,[110] if the mistake is unreasonable, jurors will not find that the defendant honestly made the mistake.

That juries necessarily use an objective, reasonable person standard in determining whether the defendant honestly held this belief seriously undermines the arguments made by courts recognizing the unreasonable mistake of fact defense to rape. These courts reason that given the criminal law's emphasis on ascertaining a person's subjective state of mind before assessing punishment, the subjective standard of recklessness is an essential limitation to a mistaken belief regarding consent. The objective standard of reasonableness, however, which would preclude unreasonable mistakes from affording a defendant a complete defense to rape would be more consistent with the implicit reasoning of juries.

B. Weaknesses in the Morgan Decision

The main thrust of the criticism of *Morgan* is that an accused may now claim that he believed the prosecutrix consented when the weight of evidence indicates that intercourse was accomplished without her consent.[111] That the jury may conclude that a belief so unreasonably held could not be honest affords little consolation, for it leaves to the jury the task of correcting by common sense a defect in the law itself.

The jury in *Morgan* aptly demonstrated this concern; it rejected the defendants' testimony and found that they could not have hon-

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him.

[1975] 2 W.L.R. 913 at 943.

109. (1975) 10 S. Austl. St. R. 139.

110. Invariably when analyzing the behavior of an individual, jurors will consider the behavior of the reasonable man in their deliberations. *See supra* note 103.

111. *See* Comment, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 146 (1983).

estly believed that Mrs. Morgan consented.[112] Therefore, the argument used to defend *Morgan* — that morally blameless defendants will not be convicted — breaks down once the issue of honest belief goes to the jury.

C. *Strengths of the Morgan Decision*

The criticisms directed at the requirement that mistakes be reasonable are based on the principle that deterrence cannot justify punishing people who are innocent.[113] To convict a defendant when he honestly but unreasonably believed his victim consented would be to impose a penalty after deciding that the defendant intended no harm. Thus, unreasonable mistakes would be treated like strict liability crimes — a highly criticized area of criminal law.[114]

Constitutional limitations also prevent punishing defendants who lacked mental culpability. The fourteenth amendment mandates that no person be denied life, liberty, or property without due process.[115] Incarcerating a defendant for a substantial number of years without giving credence to the criminal law's concern with subjective states of mind could violate due process.[116]

On the most basic level, however, the criminal justice system considers a defendant not guilty of a crime unless he acts at least recklessly with regard to the facts which make his conduct criminal. Punishing the criminally negligent individual does little to further the goals of the criminal justice system.[117]

V. Toward a Workable Solution

A. *The Common Law Standard of Reasonableness*

Morgan has had wide reaching effect in the United States. The case is cited in innumerable articles discussing the problems of mens

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112. [1975] 2 W.L.R. 913 at 946.

113. *See* Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.

114. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 218-23 (1972).

115. "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

116. *See* Lambert v. California, 355 U.S. 225 (1957) (ordinance which imposes strict liability for failure to register as a felon violates due process). *See generally* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

117. Professor Keedy states:

> If the defendant, being mistaken as to the material facts, is to be punished because his mistake is one an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence.

Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84 (1908).

rea in rape.[118] One commentator has stated that the recklessness inquiry required under *Morgan* "seems a far more appropriate standard of mens rea for rape than the intention now required by Hawaii and other states."[119]

The results reaching in *Morgan*, however, are based on the court's analysis of rape as a crime requiring specific intent. This analysis of rape is clearly antithetical to the American common law tradition that defines rape as a crime requiring only general intent.[120] *Morgan* cannot be applied in this country as it is in England, simply because the basic premises regarding intent are inapposite.

The House of Lords, in *Morgan*, stated that in crimes which fail to specify a particular mens rea, courts may imply from the common law a defense of honest and reasonable mistake which would clarify the otherwise vague mens rea requirement. This rationale has also been cited in the American courts that require reasonable mistakes.[121]

The fear, however, of convicting a man who honestly though unreasonably believed that the woman consented has resulted in courts rejecting the common law's requirement of reasonableness and instead applying *Morgan*, thus allowing an honest mistake alone to excuse what would otherwise be rape. In these jurisdictions, there is no need to prove that the defendant is free from fault, for any mistake made in good faith suffices as a defense. Defendants in such jurisdictions are not morally blameless for they have not acted as society expects a reasonable person to act, yet rape laws provide no means by which to justly punish them.

B. Grading the Offense

1. The Approach of the Homicide Law. — The law of homicide provides an excellent model that can be applied to the crime of rape. With homicide offenses, culpability is graded into degrees. As one criminologist notes, "Culpability is not a matter of intending or not intending, but a question of degree. And the degree of culpability is gauged by the actor's interaction with his victim and the relative dependence or indepedence from the surrounding environment."[122]

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118. *See, e.g.*, Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75, 92 n.53 (1980); Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1537 (1975); Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 200 n.81 (1978).

119. Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1541 (1975). *See supra* notes 43-44 and accompanying text.

120. *See supra* notes 49-50 and accompanying text.

121. *See supra* notes 80-90 and accompanying text.

122. G. FLETCHER, RETHINKING CRIMINAL LAW 711 (1978).

The characteristics of homicide which led to its division into degrees according to the culpability and dangerousness of the offender's conduct are similar to those of rape. Homicides are typically committed by people acquainted with the victim.[123] Similarly, almost half of all rapes are committed by a person known to the victim.[124] Homicide is a product of human interaction, as is rape. The law recognizes that the gravity of a murderer's act may be diminished by surrounding circumstances, just as the reprehensibility of a rapist's conduct may depend on the circumstances surrounding the offense.

In recognizing a need to distinguish among murderers according to their different levels of culpability, legislators and judges have created distinct degrees of homicide offenses, the penalties of which are determined according to the degree.[125]

2. Gradation of Forcible Rape in the Model Penal Code. — Where is exists, varying the level of the offense with reference to the degree of culpability involved, typically is done according to the victim's relationship with the defendant.[126] The Model Penal Code divides rape into two degrees. The defendant commits rape in the first degree if he inflicts serious bodily injury on the victim or if the victim is not a voluntary social companion of the defendant when the crime occurs and has not previously engaged in consensual sexual intercourse with him. Rape is classified as a felony in the second degree in all other instances, except those defined in the Code's last category as "gross sexual imposition," an offense which is a felony in the third degree. The crimes prohibited by this section include non-

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123. M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 83 (1958).

124. One study of the victim-offender relationship divides rapists into two primary categories: strangers, and persons known to the victim, the latter of which is further subdivided into six groups. Strangers comprise 42.3% of all rapists with the remaining 57.7% falling within one of the latter categories. M. AMIN, PATTERNS IN FORCIBLE RAPE 246-47 (1971).

125. First degree murder consists of premeditated and deliberate killings, and felony-murder where the felony is arson, rape, burglary, or robbery. Second degree murder is intentional killing committed without the premeditation and deliberation which characterizes first degree murder. Second degree murder also includes killings which result from the intention to inflict serious bodily injury. Homicide is further divided into two categories of manslaughter; voluntary and involuntary. Voluntary manslaughter is most typically described as murder committed while in the heat of passion: intentional killing the seriousness of which is mitigated by a "reasonably induced emotional disturbance." W. LAFAVE & A. SCOTT, CRIMINAL LAW 573 (1972). Involuntary manslaughter is killing which results from criminal negligence, a standard of negligence which requires the presence of an unreasonable risk that death will result from the defendant's act. *See generally*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 562-86 (1972).

As the degree of the crime decreases, so does the severity of the penalty. Fletcher states, "The grading of homicide disabuses us of the view that voluntariness and freedom of the will are black-and-white issues. Rather the shading develops by perceptible degrees from total dependence on circumstances to total independence of external influence." G. FLETCHER, RETHINKING CRIMINAL LAW 353 (1978).

126. *See* MODEL PENAL CODE § 213.1 (1980). The drafter explain: "[A] community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes. . . ." MODEL PENAL CODE § 207.4, Comment at 243 (Tent. Draft No. 4, 1955).

consensual intercourse accomplished by threat, by fraud, or with the knowledge of a victim's mental incapacity or inability to appraise the situation. Since physical force is not used in such circumstances the drafters concluded it would be proper to reduce the degree of the offense accordingly.[127]

The gradations of forcible rape under the Model Penal Code are premised on three controlling factors: manifestations of the defendant's culpability and dangerousness, the presence or absence of factors which objectively verify the culpability and dangerousness of the defendant, and the amount of harm suffered by the victim.[128] These factors closely parallel those used in grading the homicide offenses, and afford an effective means of creating distinctions among defendants. The rapist who beats his victim into submission would manifest the necessary culpability and dangerousness to differentiate his act from that of the defendant who, for instance, unwittingly has intercourse with a willing woman who is legally incapable of giving effective consent because of her mental incompetence.

3. Recommendation. — The glaring failure of legislatures to include an offense of unreasonable mistakes as to consent has encouraged arbitrary results. Some jurisdictions convict and sentence the defendant to a long prison term[129] while in the same circumstances others would find him innocent and release him.[130] To remedy these inconsistencies, unreasonable mistakes should be treated as an offense punishable by a term of years shorter than that established for rape.[131] Giving due consideration to the low level of culpability required by the suggested offense, as well as to the general proposition that behavior must be at least reckless to merit strict criminal sanctions, the unreasonable mistake should be classified as either rape in the fourth degree or, following the Model Penal Code, gross sexual imposition in the second degree.

This commentator recognizes that criminalizing unreasonable mistakes regarding consent raises questions about the efficacy of imposing sanctions on conduct that is less than reckless. Such a step is neither new nor foreign to the law, however, because numerous laws already exist which punish defendants who possess neither the sub-

127. MODEL PENAL CODE § 213.1, Comment, at 279 (1980).

128. *Id.*

129. *See supra* note 69 and accompanying text.

130. *See supra* note 64 and accompanying text.

131. For example, the Michigan statute punishes criminal sexual conduct in the first degree by "imprisonment in the state prison for life or for any term of years," and criminal sexual conduct in the fourth degree as a "misdemeanor punishable by imprisonment for not more than 2 years, or by a fine of not more that $500.00 or both." MICH COMP. LAWS §§ 750.520(b)(2), 750.520(e)(2) (1974) (MICH. STAT. ANN. §§ 28.788(2)(2), 28.788(5)(2) (1982)).

jective intent nor the actual knowledge to commit a crime.[132] By requiring members of society to comply with legally prescribed standards of behavior, these laws comport with the purposes of the criminal justice system. Furthermore, the constitutionality of these laws has been upheld by the Supreme Court.

The often voiced opinion that it is senseless to hold a person criminally liable for acts committed negligently[133] has typically prompted legislators and judges to require recklessness as an essential limitation on the mens rea needed to commit a crime. However, as has already been detailed, important considerations for a contrary position exist. The mens rea required in situations involving provocation, which distinguishes murder from manslaughter, is by common law and statute the objective standard of the reasonable man and the way he would react to provocation.[134]

One commentator has observed, "There is nothing unreasonable in requiring a citizen to take responsible care to ascertain the facts relevant to his avoiding doing a prohibited act."[135] Rather than completely exculpating the defendant who unreasonably believed the prosecutrix consented, legislatures should recognize that the existence of such a belief merely reduces the gravity of the offense. Grading the crime of rape to include an offense of unreasonable mistake as to consent would eliminate the dilemma juries currently face of either acquitting a defendant of reprehensible conduct or convicting him of an offense which imposes serious penalties.

The defense of reasonable mistake of fact concerning consent will comport with the common law and thus provide a complete defense to the more culpable offense of forcible rape. Jury instructions on the issue of mistake should clearly reflect the qualification of reasonableness and will do much to avert the confusion and misunderstanding prevalent in rape cases where the mistake of fact defense is raised.

VI. Conclusion

The biases and misconceptions attendant to rape are as old as the crime itself. The origin of rape laws as a means of protecting a man's property interest in his daughter's virginity accounts for the laws' competing objectives of protecting women from sexual assault

132. *E.g.*, the blue-sky statute construed in State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933), providing that anyone who files a false financial statement with the Secretary of State is guilty of crime. For further examples, see Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84-88 (1983).

133. *See supra* note 117.

134. *See* S. TOLL, PENNSYLVANIA CRIMES CODE ANNOTATED 314 (1974).

135. Lord Diplock in Sweet v. Parsley, [1970] A.C. 132, 165, *quoted in* Director of Public Prosecutions v. Morgan, [1975] 2 W.L.R. 913, at 955.

and protecting innocent men from severe and unmerited punishment. In attempting to satisfy both these goals, legislatures enacted rape laws which inquired into the victim's prior sexual activities and emphasized her behavior during the assault — an emphasis often resulting in rape victims feeling as though they were on trial.

Rape reform legislation of the past decade has changed the focus of the laws from the victim to the defendant. Some rape laws now provide that a woman no longer need prove that she resisted her attacker to obtain a conviction. While this reform eliminates an obstacle to convicting a rapist, it also increases the likelihood that an innocent man will be punished. The mistake of fact defense reduces this likelihood, but questions remain on what form the mistake must take.

Current rape laws also fail to adequately distinguish more serious conduct from conduct that is less culpable. Those jurisdictions which do not recognize that a defendant's unreasonably held belief that his victim consented constitutes a defense to rape punish that defendant just as severely as they punish the rapist who intentionally brutalizes his victim. Other jurisdictions, which recognize the unreasonable mistake of fact defense, treat the defendant as leniently as they treat the man whose mistake was reasonable. By providing penalties which are too severe or failing to assess any penalty at all, current rape laws afford no means of justly punishing the defendant who unreasonably believes that a woman consents to intercourse. Consequently, the defendant who makes an unreasonable mistake of fact regarding consent may be treated identically to the defendant who makes a reasonable mistake, and be completely exculpated.

Rape laws must be reformed to include provisions which assess adequate punishment, neither too harsh nor too lenient, upon the unreasonably mistaken defendant. Until these reforms are made, the law will continue to provide an excuse for defendants who force themselves upon unwilling women under circumstances in which no reasonable man would consider such conduct.

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